Mezibov at 717. The court below explained that its holding merely recognizes the "commonsense principle" that "attorneys do not possess 'any right in the First Amendment that is not the common legacy of every citizen'" *Mezibov* at 719 (quoting *Ukranian-American Bar Assoc., Inc. v. Baker*, 893 F.2d 1374, 1381 (D.C. Cir. 1990)). Since no citizen has a right to "speak up or otherwise present a point of view in the courtroom," neither does an attorney. *Id.* at 718.

Mezibov has not cited one case from this Court or a circuit court that conflicts with the decision below. Rather, he exaggerates the sweep of the holding by implying it extinguishes attorneys' First Amendment rights in all settings. He casts the Sixth Circuit's decision in terms of a diminution of the "social value" of an attorney representing a client and states the decision threatens the criminal justice system. (Petition at pp. 9-10). In fact, when read in proper context, the decision below is a mere recognition of the longstanding principal that the courtroom is a nonpublic forum, not a venue for *free and open* debate. Thus, expressive activity undertaken on behalf of clients in the course of judicial proceedings cannot satisfy the "protected activity" element of the attorney's First Amendment retaliation claim under § 1983.

Mezibov's cites *Canatella v. California*, 304 F.3d 843 (9th Cir. 2003) as "recognizing [an] attorney's First Amendment right to advocate for [his] client . . ." (Petition at p. 8). *Canatella* involved an attorney's challenge of state statutes and rules of professional conduct which he claimed were vague and overbroad under the First and Fourteenth Amendments. The district court in *Canatela* dismissed the case for lack of subject matter jurisdiction. The Ninth Circuit held that the district court could properly accept jurisdiction of the case, the attorney had standing,

and the attorney's claims were ripe for review. The Ninth Circuit never reached the substantive issue of whether the attorney had *personal* First Amendment protection for any in-court statements he might make.

Mezibov cites *Lewellen v. Raff*, 843 F.2d 1103 (8th Cir. 1988), a case that is inapposite for several reasons. Lewellen was a defense attorney who became involved in a plan to "settle" criminal charges against his client. His client agreed to leave town if the complaining witnesses agreed not to testify. The prosecutor instituted criminal proceedings against Lewellen for bribery. Lewellen sued the prosecutor in federal court under § 1983 seeking to enjoin the state court case against him. Lewellen alleged the prosecutor charged him with bribery because he was black, because he ran for a political office against an incumbent of the prosecutor's party, and because of certain objections he made to jury selection procedures utilized by court during his client's trial. The district court granted the injunction so that the § 1983 case could be tried on the merits prior to the start of the criminal trial against Lewellen. The prosecutor appealed the decision to issue the injunction. The Eighth Circuit concluded the district court's preliminary factual findings were not clearly erroneous and were sufficient to support issuing the injunction. It never reached the merits of whether the attorney's in-court statements on behalf of his client constituted "protected activity" for purposes of a First Amendment retaliation claim.

Mezibov also cites *Levine v. United States District Court for the Cent. Dist. of Cal.*, 764 F.2d 590 (9th Cir. 1985). In *Levine*, attorneys representing a defendant in a criminal prosecution sought a writ of mandamus compelling the district court to dissolve a restraining order it had issued to

prevent them from speaking with the media. The Ninth Circuit analyzed the restraining order under strict scrutiny as a prior restraint on the attorneys' First Amendment right to free speech *outside the courtroom*. Mezibov attempts to create a conflict by highlighting the *Levine* court's statement in passing that "attorneys and other trial participants do not lose their constitutional rights at the courthouse door." *Id.* at 595. However, the challenged restraining order in *Levine* had no limitations on the attorneys' in-court statements on behalf of their clients, nor on the contents of motions or other court communications. *Levine* at 593, n. 1. In fact, the court below expressly recognized that attorneys do have First Amendment protection for out-of-court statements. *Mezibov* at 718 n. 1. Thus, there is no conflict between *Levine* and the opinion below.

Mezibov also cites this Court's opinion in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). *Velazquez* involved the Legal Services Corporation, a non-profit organization created by Congress to distribute funds to local organizations for the representation of indigent clients. A federal statute allocated federal funds for the representation, but contained a condition prohibiting representation if it involved an effort to amend or challenge existing welfare law. Because the condition effectively placed a prior restraint on otherwise reasonable arguments that could be made *on behalf of the indigent clients*, this Court declared the condition invalid. *Id.* at 549. The Court in *Velazquez* was concerned that legitimate arguments and legal theories that could be advanced on behalf of the clients would be silenced, resulting in a deprivation of the *clients' rights*. As recognized by the Court below, "*Velazquez* does not recognize a First Amendment right personal to the attorney, independent of his client." *Mezibov* at 720.

The court below merely held that for purposes of the "protected activity" inquiry in an attorney's First Amendment retaliation claim, the attorney has no "***personal*** First Amendment rights" in his client's criminal proceeding. *Mezibov* at 721. The Sixth Circuit's opinion is consistent with the prior decisions of this Court and the other circuits and the petition for writ of certiorari should be denied.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE PROPER STANDARD FOR FINDING ADVERSE ACTION IN A FIRST AMENDMENT RETALIATION CLAIM

In finding Mezibov failed to allege adverse action of sufficient constitutional dimension to support a § 1983 retaliation claim, the court below clearly applied the appropriate rule of law: "[T]he plaintiff must ultimately prove . . . an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that [protected] conduct." *Mezibov* at 717 (citing *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (*en banc*)). This is the same legal standard used by the other circuits. *Bennett v. Hendrix*, 423 F.3d 1247, 1250-51 (11th Cir. 2005) (listing cases). Mezibov's argument that the court below adopted a novel "actual chill" requirement for First Amendment retaliation claims is specious.

Mezibov's real quarrel with the decision below is with the court's application of the rule. However, the Sixth Circuit's application of the objective "person of ordinary firmness" test was also consistent with the other circuits. First, the court recognized it could only take into account those comments made by Allen that could possibly be

considered defamatory because Allen himself retained First Amendment rights.[3] *Mezibov* at 722.

The court applied the objective "person of ordinary firmness" standard, as do other circuits, by tailoring the analysis to the particular circumstances of the plaintiff's claim. The court recognized that the definition of adverse action is not static across contexts. "Prisoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens, before an action taken against them is considered adverse." *Mezibov* at 721 (citing *Thaddeus-X* at 398 ("The benefits of such a standard are that it is an objective inquiry, capable of being tailored to the different circumstances in which retaliation claims arise, and capable of screening the most trivial of actions from constitutional cognizance."). Thus, the court stated, the appropriate application of the test in Mezibov's case was whether the alleged defamation would "deter a criminal defense attorney of ordinary firmness from continuing to file motions and vigorously defend his client." *Mezibov* at 721.

This context-sensitive approach to applying the objective standard has been endorsed by other circuits. *See Bennett* at 1252 (11th Cir.); *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2002) ("Determining whether a plaintiff's First Amendment rights were adversely affected by retaliatory conduct is a fact intensive inquiry that focuses on the status of the speaker, the status of the retaliator, the relationship

3. The Sixth Circuit had previously recognized in *McBride v. Village of Michiana*, 100 F.3d 457, 462 (6th Cir. 1996) that the exercise by government officials of their own free speech rights could not support a claim for retaliation.

between the speaker and the retaliator, and the nature of the retaliatory acts.").

Nowhere did the Sixth Circuit require that Mezibov allege he was "actually chilled" from protected conduct by Allen's statements. The court simply determined that Mezibov's complaint did not satisfy the objective "person of ordinary firmness" standard, as tailored to Mezibov's specific claim: "With all that in mind, we are not persuaded that a criminal defense attorney of ordinary firmness would be deterred from vigorously defending his clients as a consequence of the alleged defamation in this case." *Mezibov* at 722.

The purpose of the "person of ordinary firmness" test as applied by the Sixth Circuit is to ensure that the First Amendment is not "trivialized" by claims based upon alleged adverse action of less than constitutional proportions. *Mezibov* at 721 (citing *Thaddeus-X* at 397 (quoting *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982))). In evaluating Mezibov's claimed injury, juxtaposed with Allen's allegedly defamatory comments to the media, the court concluded as follows:

> [T]he substance of Allen's out-of-court comments was basically that Mezibov is a bad attorney, that he is inexperienced, and that he was putting his own interests before those of his client. To the extent these comments are not constitutionally protected in their own right, we do not think they exact a harm upon Mezibov that would deter an ordinary criminal defense attorney from vigorously representing his clients.

Mezibov at 722-23. This is a rational application of an accepted rule of law and is consistent with the previous rulings of other circuit courts.

Contrary to Mezibov's contention, the decision below did not convert the objective "person of ordinary firmness" standard to a subjective one. Rather, it simply applied the standard in a way that meaningfully distinguishes between claims that would "trivialize the First Amendment" and claims involving adverse action of Constitutional dimensions. *Mezibov* at 721.

There is no conflict among the circuits as to the proper standard for determining if "adverse action" has been taken against a plaintiff for purposes of a First Amendment retaliation claim. Therefore, the petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court deny the petition for writ of certiorari.

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